Proceeding: Missouri Petition for Preemption of Section 392-410(7) of the Revised Statues o Record 1 of 1

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Before The
Federal Communications Commission
Washington, D.C.

In The Matter Of:	)	
The Missouri Municipals' Petition For	)	
Preemption Of Section 392.410(7) Of The	)	CC Docket No. 98-122
Revised Statutes Of Missouri Under	)	
Section 253 Of The Communications Act	)	
Of 1934, As Amended	)	

COMMENTS OF THE MISSOURI ATTORNEY GENERAL

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Introduction

The Missouri Attorney General is responding with the following comments to the petition filed by the Missouri Municipal League and several other plaintiffs. The Missouri Attorney General opposes that petition and challenges the standing of the petitioners to pursue this matter. The fundamental question presented by petitioners for the Commission to answer is whether the Commission should rule that a Missouri statute, designed to foster competition in telecommunications by ensuring that local government does not usurp competitive opportunities, is pre-empted by a federal statute designed to create just such competition and opportunities in telecommunications.

The Attorney General has had the opportunity to read comments that some other parties intend to file with the Commission. To avoid needless repetition, the Missouri Attorney General's comments will be brief and will focus on the key public policy issues behind the Telecommunications Act of 1996 and section MO. REV. STAT. § 392.410(7) (Supp. 1997), the Missouri statute in question. The Attorney General will refrain from discussing every conceivable problem with petitioners' argument. The Attorney General of Missouri respectfully requests that the Commission deny petitioners' request that the Commission deem section 392.410(7) RSMo Cumm Supp 1997 preempted by section 253(a) of the Telecommunications Act of 1996.

I. The Commission is Not a Court

This Commission's interpretations of statutes and rules, as applied to facts, are entitled to a great deal of deference by the courts. The Commission is an agency created by Congress to

regulate telecommunications. The Missouri Attorney General does not question or challenge the Commission's expertise.

But the questions presented to the Commission by the Missouri Municipal League and its co-petitioners are purely legal. They are constitutional questions pertaining to the Supremacy Clause of Article VI of the United States Constitution and the authority provided municipalities under Missouri's Constitution. They deal with the interplay between a state statute and a federal law, but at their their very core, the questions pertain to the powers of a municipality under Missouri law. And while the members of the Commission are certainly capable of forming legal opinions regarding Constitutional law -- be it federal or state, the Commission is still an agency of the execute branch of government. As an executive agency, regardless of its federal or state creation, the Commission is not the right forum to adjudicate Constitutional issues.

The appropriate forum to adjudicate issues pertaining to the Supremacy Clause of the United States Constitution and the powers possessed by a Missouri municipality under Missouri law is a courtroom. And, because all the relevant parties and the state law involved are Missouri specific, a Missouri courtroom is the most appropriate forum to adjudicate the issues presented by the petitioners to the Commission for adjudication.

II. Missouri's Understanding of the Telecommunications Act of 1996

The undisputed underlying purpose of the Telecommunications Act of 1996 is that Americans reap the benefits of free market competition. The principal means that Congress has chosen to accomplish that goal is to impose mandates upon telecommunication providers and regulators. These mandates, the various provisions of the Act, are geared towards opening the

local and long distances markets through a carrot and stick approach. Monopolization of any telecommunications market is anathema to the spirit of the law. The Act proscribes any entity's ability to dominate a market.

III. A City Owned Utility is an Easy Monopolist

The Missouri Attorney General does not wish to label any of the petitioner municipalities as malfeasors. It is the Attorney General's position as a matter of faith that most municipalities who enter a utility business, be it telephony, power, or water, do so to serve their residents. But, because of easements, emminent domain, exemptions from local licensing ordinances, tax status and the other powers possessed by a subdivision of government, it is easier and less expensive for a municipally-owned utility to operate than it is for its private sector counterpart.

It is a matter of common sense that municipalities have budgets and expendatures. They have limited dollars to accomplish their many goals and fulfill their many responsibilities. A municipality which owns a utility is naturally going to operate it in such a manner as to maximize revenue and minimize costs. It would be foolhardy not to. And a municipality that owns a utility is going to take advantage of all the benefits that come with sovereignty, regardless that it may harm or discourage actual and potential competitors.

IV. The Missouri General Assembly is Inspired by the Same Spirit as the Telecommunications Act of 1996

Missouri is moving towards deregulation of its telecommunications market. Missourians, too, would like to reap the benefits of free market competition in telephony. One of the ways in which the Missouri General Assembly has advanced that process is by passing MO. REV. STAT. § 392.410(7) (Supp. 1997).

MO. REV. STAT. § 392.410(7) (Supp. 1997) states:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
>
> (1) For its own use;
> (2) For 911, E-911 or other emergency services;
> (3) For medical or educational purposes;
> (4) To students by an educational institution; or
> (5) Internet type services.

A straight-forward reading shows that section 392.410(7) is designed to make sure that a level playing field exists among all the potential competitors who might offer telecommunications service to the public. Because municipalities are uniquely positioned to tilt the playing field to their advantage, the Missouri General Assembly has restricted their play in the game. That restriction, in the short run, fosters competition for telephony. Competition, in the long run, benefits Missourians. And because one can safely assume Missourians make calls out-of-state, and non-Missourians call their family, friends, and

business associates in Missouri, the open-market competitive benefits of section 392.410(7) will be enjoyed by everyone in varying degrees.

Moreover, the restriction on municipalities is reasonable. It is limited in scope and the statute expressly expires on August 28, 2002. At that time, the Missouri Generally Assembly can assess whether competition has grown enough -- whether the competitors have become fit enough -- that the slope of the field favoring municipalities is no longer an obstacle to good, competitive businesses.

As stated in the introduction, other parties filing comments to the petition discuss in great detail statutory construction, the limited powers of municipalities under Missouri law, and numerous other reasons why the Commission should deny the petition. Though the Attorney General will not reiterate the same arguments, we must stress that petitioners fail to inform the Commission just how limited the powers of a Missouri municipality are. A Missouri municipality can only do what the Missouri Constitution and the Missouri General Assembly say it can do. The Missouri Constitution does not expressly grant a municipality rights to undertake much less to monopolize telecommunications service. The Missouri Generally Assembly evidently does not want to confer that power to Missouri municipalities. Petitioners are asking a federal agency to rule that a federal statute, designed to foster competitive telecommunications markets, protects them in their ability to monopolize a market, though their own Constitution grants them no such authority.

That is why ultimately, the issues presented by petitioners are issues of municipal power, not telecommunications. Hypothetically, the Commission could grant a Missouri

municipality a telecommunication license if the Commission felt that such a municipality satisfied all the technical conditions to receive a license. But that still would not mean that such a licensed municipality could lawfully be in the telephony business in Missouri. Because that license cannot give a state's political subdivision the authority do something the Missouri Constitution has not empowered it to do. In other words, in theory, a municipality could possess a license, but in practice, it must also have the authority to use it. And under Missouri law, petitioners do not have the authority to use it. Petitioners want this Commission to lose sight of that distinction. Petitoners want to obfuscate this distinction by mischaracterizing it as a federal pre-emption issue. The Commission should refrain from making determinations about what authority the Missouri constitution and the Missouri General Assembly can convey upon a political subdivision of the State of Missouri.

V. Prayer for Relief

For the reasons stated in these comments and in the comments of Southwestern Bell Telephone Company, the Attorney General of Missouri respectfully requests that the Commission deny petitioners' request that the Commission deem MO. REV. STAT. § 392.410(7) (Supp. 1997) pre-empted by section 253(a) of the Telecommunications Act of 1996 and all other relief sought by petitioners.

Respectfully submitted,

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I hereby certify that on this thirteenth day of August, 1998, a true and correct copy of the foregoing was mailed by first-class, United States mail, postage prepaid, to:

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